

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28**

SHAMROCK FOODS COMPANY and BAKERY, CONFECTIONARY, TOBACCO WORKERS, AND GRAIN MILLERS' INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO/CLC	CASE NO. 28-CA-150157 REPLY IN SUPPORT OF PETITION TO REVOKE AND OBJECTIONS TO SUBPOENA
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Respondent Shamrock Foods Company (“Shamrock”), by and through its undersigned counsel, has respectfully petitioned for an order revoking, in part, Subpoena Duces Tecum B-1-NZDQ TZ (the “Petition”). General Counsel has opposed the Petition on the basis of its belief that the subpoenaed documents *may* be *generally* relevant either to the General Counsel’s claimed violations or to defenses that Shamrock may raise. While there are a number of flaws in General Counsel’s arguments, Shamrock respectfully submits that the three most glaring issues merit a written response.

First, General Counsel has demanded production of all documents reflecting any discussion by Shamrock managers of any topic that has any relation to a union or union organizing. This request includes, but is not limited to, any management discussion of the Union involved in these proceedings. (See Subpoena Nos. 16-20, 23-27, 36-45, and 47-49, discussed at pp. 9-10 of Resp.’s Petition). General Counsel claims in its opposition that this broad request is proper because it suspects that Shamrock harbors union animus.

Section 8(c) of the Act prohibits the Board from finding a violation based on “[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form . . . if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). Congress amended the Act to include this language specifically based on its view that the Board was “regulat[ing] employer speech too restrictively.” *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947, 954 (D.C. Cir. 2013), overruled in part on other grounds, *Am. Meat Inst. v. United States Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); *see also* S. Rep. No. 80–105, pt. 2, pp 23-24 (1947). The Supreme Court thus has recognized that Section 8(c)’s protections are at least as broad as the First Amendment. *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 67 (2008)(“From one vantage, § 8(c) merely implements the First Amendment in that it responded to particular constitutional rulings of the NLRB.”) (internal quotations and citations omitted).

Nonetheless, the General Counsel’s position is that an accusation of union animus is sufficient to provide it with unfettered review of employer communications. This argument, if accepted, will create a chilling effect on employers’ exercise of their free speech rights guaranteed under both the Act and the United States Constitution. Indeed, the General Counsel refused in this case to provide even the names of witnesses that *it intends to call at the hearing* on the basis that to do so might chill the exercise of Section 7 rights. Its demand for production of Shamrock’s internal communications presents no less a danger in regard to rights protected under Section 8(c). Rather than being permitted to sift through Shamrock’s internal documents in a boundless search for additional unsupported allegations, the General Counsel should be limited to communications related to the violations it has asserted.

Second, the General Counsel’s claim that it is entitled to any documents that *may* relate to any defense Shamrock *might* assert is unjustified. This is particularly the case in light of General Counsel’s refusal to provide critical factual information to Shamrock regarding the allegations against it. In refusing to provide this information, General Counsel expressed its

view that NLRB proceedings should be conducted on a “trial by fire” basis. Yet, despite this statement, General Counsel asks the ALJ to slant the field significantly in its favor by allowing it essentially to conduct discovery concerning defenses Shamrock *may* assert. Access to the opposition’s information should be parallel. A party that refuses to provide information should not be permitted to demand it.

Finally, a number of the arguments in General Counsel’s opposition are unresponsive. For example, Request No. 53 demands production of a list of all Shamrock warehouse employees, along with their dates of hire, job classifications, job histories, pay rates, changes in pay rates, and changes in employment status. General Counsel claims that it is entitled to this information because it has alleged that Shamrock unlawfully granted a pay raise to certain employees. This *non sequitur* does not support the breadth of the subpoena request.

Similarly, Request No. 51 seeks production of all “[f]lyers posted at Respondent’s facility since about January 1, 2015 referencing the Union, or unions generally and any copies, photographs, videos, or other recordings of such flyers.” This request appears to be directed, at least in part, toward flyers prepared by Shamrock. The General Counsel claims, without explanation, that this request somehow relates to its claim that Shamrock discarded Union literature. Again, the logic of this conclusion is not apparent.

Perhaps most remarkably, General Counsel insists that any documents in the possession of Art Manning—including his personal credit card receipts—should be deemed to be in Shamrock’s possession simply because General Counsel has alleged that Manning is a supervisor. This claim is untenable. As General Counsel concedes, it bears the burden of proof to show that Manning is a supervisor under Section 2(11) of the Act. 29 U.S.C. 152(11). It cannot presume entitlement to Manning’s personal information simply by making an allegation. This request accordingly should be denied.

While the above discussion is not intended to be a complete catalog of the flaws in General Counsel's arguments, these examples confirm that the subpoena duces tecum is improper. Shamrock's Petition To Revoke should accordingly be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5st day of September, 2015, a true copy of the foregoing was filed electronically in .pdf format with the Regional Director for Region 28 of the National Labor Relations Board through the National Labor Relations Board's Internet website, for referral to the Administrative Law Judge in accordance with Section 102.31(b) of the Rules and Regulations of the National Labor Relations Board. A copy was also sent by electronic mail to:

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